IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BARBARA A. COHEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 02-2246-JPO
	)	
TED LOCKWOOD, M.D.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. Introduction

This is a medical malpractice case. It arises out two cosmetic surgery procedures performed on June 6, 2000, on the plaintiff, Barbara A. Cohen, by the defendant, Ted Lockwood, M.D. Plaintiff had a bilateral implant mammoplasty (to lift sagging breasts), and a bilateral axillary brachioplasty (to tighten loose skin of the upper arms) with liposuction of plaintiff's arms and axilla. Plaintiff claims that, during these procedures, defendant negligently cut or partially cut her long thoracic nerve. Plaintiff further claims that this resulted in permanent thoracic neuropathy, manifesting itself in a condition known as "scapular winging," as well as an overall decrease in functionality of her left arm.

The case presently is before the court on pretrial motions in limine, i.e., defendant's motions to exclude the testimony of Andrew D. Brown, M.D. (**doc. 51**), Hubert Weinberg, M.D. (**doc. 52**), and Gerald D. Ginsberg, M.D. (**doc. 53**); and plaintiff's motion to exclude the testimony of Peter A. Vogt, M.D. and Richard B. Rosenbaum, M.D. (**doc. 54**). The court has reviewed the parties' motions and opposing memoranda (docs. 62 & 63). For the

reasons explained below, the court will deny each of the motions, except one limited portion of defendant's motion as it relates to Dr. Ginsberg.

II. Applicable Standards

Under Fed. R. Evid. 702, expert testimony generally is admissible if the witness is qualified as an expert and his specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." The court has a "gate-keeping" obligation to determine the admissibility of all expert testimony.[1] Expert testimony is admissible only if it is both relevant and reliable.[2]

Rule 702 was amended in December 2000 in response to *Daubert v. Merrell Dow Pharms., Inc.* and its progeny, including *Kumho Tire Co. v. Carmichael*. Rule 702 now provides that expert opinion testimony is admissible "if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

As a practical matter, the focus now is on the principles and methodologies, not the conclusions generated. However, if an expert reaches conclusions "that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have

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[1] *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141 (1999) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

[2] *Id.*

not been faithfully applied."[3] Therefore, the court must look at the facts underlying the opinion, the methodology, and the link between the facts and the conclusion drawn.[4]

The 2000 amendments suggest that experience alone – or experience combined with other knowledge, skill, training, or education – may provide a sufficient foundation for expert testimony.[5] Indeed, "the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."[6] However, the court's gate-keeping function requires more than simply "taking the expert's word for it."[7] A witness relying solely or primarily on experience must give a sufficient explanation of how the experience leads to the conclusion reached.[8] All proffered expert testimony must be properly grounded, well-reasoned, and not speculative before it may be admitted.[9]

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[3] Fed. R. Evid. 702 advisory committee's notes (citing *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996)).

[4] *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999).

[5] Fed. R. Evid. 702 advisory committee's notes.

[6] *Id.*

[7] *Id. See also General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)("Nothing . . . requires the district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.")

[8] Fed. R. Evid. 702 advisory committee's notes.

[9] *Id.*

An expert may offer an opinion even if it "embraces an ultimate issue to be determined by the trier of fact."[10] But an expert may not simply tell the jury what result it should reach.[11] Such expert testimony often is excluded on the grounds of stating a legal conclusion, thereby usurping the function of the jury in deciding facts, or interfering with the judge in instructing the law.[12] An expert opinion without an exploration of the criteria upon which such opinion is based does not assist the jury to "understand the evidence or determine the fact in issue."[13]

The court has discretion in determining its approach to the reliability analysis in any given case.[14] The court must make a practical, flexible consideration of the relevant factors and the circumstances of the case.[15] It is essential, however, to make a determination on the record that is sufficient to allow a reviewing court to determine whether the trial court properly applied the relevant law.[16]

In making its reliability determination, the court may use the *Daubert* factors and ask the following types of questions: (1) whether the theory or technique has been tested (or can

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[10] Fed. R. Evid. 704.

[11] *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993).

[12] *Id.* at 188-89.

[13] Fed. R. Evid. 702.

[14] *Kumho Tire*, 526 U.S. at 152; *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000); *United States v. Velarde*, 214 F.3d 1204, 1208-09 (10th Cir. 2000).

[15] *Kumho Tire*, 526 U.S. at 149-52; *Heller*, 167 F.3d at 155.

[16] *Goebel*, 215 F.3d at 1087-88; *Velarde*, 214 F.3d at 1209.

be tested); (2) whether the theory or technology has been subjected to peer review and publication; (3) whether there is a known or potential high rate of error; (4) whether there are standards controlling the techniques of operation; and (5) whether the theory or technique is generally accepted within the relevant community.[17] It must be kept in mind, however, that these factors are not exclusive and may not apply in some cases.[18]

Even after *Daubert*, rejection of expert testimony has been the exception rather than the rule.[19] The gate-keeping function of the court does not replace the traditional adversary system and the role of the jury.[20] Questions related to the bases and sources of an expert's opinion affect the weight to be assigned to that opinion rather than its admissibility.[21] The weight and credibility of expert testimony are for the trier of fact to determine.[22] "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden

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[17] *Kumho Tire*, 526 U.S. at 149.

[18] *See* Fed. R. Evid. 702 advisory committee's notes.

[19] Fed. R. Evid. 702 advisory committee's notes; *Aerotech Res., Inc. v. Dodson Aviation, Inc.*, No. 00-2099, 2001 WL 474296, at *2 (D. Kan. Apr. 4, 2001). *Cf. Robinson v. Missouri Pac. R.R.*, 16 F.3d 1083, 1090 (10th Cir. 1994)("Doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent enough . . . to ignore what is unhelpful in its deliberations.").

[20] *Daubert*, 509 U.S. at 596.

[21] *Viterbo v. Dow Chemical Co.,* 826 F.2d 420, 422 (5th Cir. 1987). *See also United States Surgical Corp. v. Orris Inc.,* 983 F. Supp. 963, 967 (D. Kan. 1997)(finding that lack of specialization of an expert "does not affect the admissibility of the opinion, but only its weight").

[22] *United States v. Varoz*, 740 F.2d 772, 775 (10th Cir. 1984).

of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[23]

III. Analysis and Discussion

A. Plaintiff's Experts

1. Andrew D. Brown, M.D.

Dr. Brown is a physiatrist. He is one of plaintiff's treating physicians. Dr. Brown saw plaintiff on four occasions between December 2002 and September 2003. On September 15, 2003, plaintiff's counsel took Dr. Brown's videotaped deposition for the purpose of trial. Dr. Brown opined that plaintiff's long thoracic neuropathy has increased her risk of developing impingement syndrome. He further opined that, if plaintiff develops this condition, it may require arthroscopic surgery in the future.

Defendant argues that Dr. Brown's testimony regarding plaintiff's risk of developing impingement syndrome is speculative and does not meet the reliability test of Fed. R. Evid. 702. Defendant requests that the court strike page 32, line 1 through page 34, line 25 of Dr. Brown's deposition testimony. Plaintiff responds by arguing that Dr. Brown possesses the requisite skill, training, and knowledge in the medical field of physiatry to make it appear that his opinions rest on substantial foundation and that they would aid the jury in its search for truth.

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[23] *Daubert,* 509 U.S. at 596.

A treating physician often forms an opinion about the cause of an injury or the extent to which it will persist in the future based upon his examination of a patient.[24] Courts therefore have allowed doctors to "testify at trial concerning any medical opinions that [they] formed during the course of . . . treatment with respect to [plaintiff's] injuries, their cause, and the extent of [plaintiff's] disability."[25]

Dr. Brown bases his opinions on a range of factors, including his education, training, extensive clinical experience in treating patients, and his care and treatment of plaintiff. Dr. Brown has testified that, in addition to his clinical experience, he continues to review the current literature on physical medicine and electromyography. As to defendant's argument that Dr. Brown did not provide the specific articles supporting his opinions, his opinions appear to be based on reasoned medical analysis. Further, the lack of the specific articles is not fatal and goes to the weight, not the admissibility, of his testimony, as an expert may base his opinion on experience alone.[26] Defendant's motion, as to Dr. Brown, therefore must be denied.

2. Hubert Weinberg, M.D.

Dr. Weinberg is a plastic surgeon. He has been retained by plaintiff's counsel and is expected to testify that defendant fell below the standard of care by injuring plaintiff's long thoracic nerve during the procedures performed on June 6, 2000.

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[24] *Santoro v. Signature Const., Inc.*, No. 00 Civ. 4595(FM), 2002 WL 31059292, at *4 (S.D.N.Y. Sept. 16, 2002).

[25] *Id.*

[26] *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995).

Defendant argues that Dr. Weinberg's standard of care opinion is based solely on his assumption that plaintiff's injury occurred during one of the two procedures performed on June 6, 2000. Defendant argues that this opinion was reached without having performed a proper differential diagnosis and, therefore, does not meet the reliability test of Rule 702.

Differential diagnosis is a standard scientific technique of identifying the cause of a medical problem.[27] "Differential diagnosis refers to the process by which a physician 'rules in' all scientifically plausible causes of the plaintiff's injury. The physician then 'rules out' the least plausible causes of the injury until the most likely cause remains. The remaining cause is the expert's conclusion."[28] In *Hollander*, which is controlling authority for the case at bar, the Tenth Circuit Court of Appeals noted that a differential diagnosis is admissible in certain circumstances if determined to be reliable.[29] Although an expert is not required to eliminate every potential cause in order for his opinion to be admissible under *Daubert*, the expert is required to employ either standard diagnostic techniques to eliminate the obvious alternative causes or, if the defendant suggests some likely alternative cause of the

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[27] *Perkins v. Origin Medsystems Inc.,* No. CIV.A.3:00 CV 1405 S, 2004 WL 90034, at *7 (D. Conn. Jan. 14, 2004); *In re Paoli RR. Yard PCB Litig.,* 25 F.3d 717, 758 (3d Cir. 1994)(noting that differential diagnosis "generally is a technique that has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results").

[28] *Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193, 1209 (10th Cir. 2002)(citing *Glastetter v. Novartis Pharms. Corp*., 252 F.3d 986, 989 (8th Cir. 2001)).

[29] *Hollander*, 289 F.3d at 1211 ("We emphasize that, in other litigation, there may well be differential diagnoses . . . that do not suffer from the same deficiencies noted by the district court here . . .. In that instance, a district court might well be justified in finding opinion testimony . . . reliable under *Daubert*.")

plaintiff's condition, the expert must offer a reasonable explanation why he still believes that the defendant's action was a substantial factor in bringing about the plaintiff's condition.[30]

Defendant suggests plaintiff's bike accident in September 2000 as an alternative cause to her condition. But, the court finds that Dr. Weinberg reasonably explained his reasoning in eliminating this possible cause. Thus, the court finds that Dr. Weinberg's differential diagnosis is reliable and admissible.

Defendant also contends that Dr. Weinberg's research on the various causes of long thoracic neuropathy is insufficient, making his opinion speculative. However, a "lack of textual authority on the issue of general causation goes to the weight, not the admissibility of an expert opinion, when the expert has performed a reliable differential diagnosis."[31] The weight of expert testimony is for the jury to determine. Defendant's motion, as to Dr. Weinberg, therefore must be denied.

3. Gerald D. Ginsberg, M.D.

Dr. Ginsberg is a plastic surgeon. He is another one of plaintiff's treating physicians. On September 15, 2003, plaintiff's counsel videotaped Dr. Ginsberg's deposition testimony for the purpose of trial. Dr. Ginsberg testified that plaintiff's injury could not have been caused by her exercise routine or her bike accident.

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[30] *Perkins,* 2004 WL 90034, at *10.

[31] *McCullock*, 61 F.3d at 1044.

Defendant argues that Dr. Ginsberg's causation testimony is outside his area of expertise. Defendant further argues that Dr. Ginsberg is unqualified to testify that plaintiff's long thoracic nerve was cut and not crushed.

Finally, defendant requests that Dr. Ginsberg's standard of care testimony be stricken from the deposition transcript and the videotape edited accordingly. Here, defendant asserts that the standard of care opinion constitutes unfair surprise beacuse it was not expressed in Dr. Ginsberg's report.

Dr. Ginsberg's credentials clearly suggest that he is qualified as an expert in plastic surgery. The court finds that the testimony proffered by Dr. Ginsberg is within the reasonable confines of his special experience and training.[32] Dr. Ginsberg's opinions are accompanied by detailed explanations, from which the court discerns a basis of sufficient facts and data as required by Rule 702. As with Dr. Weinberg, the court finds that Dr. Ginsberg reasonably explained his reasoning in eliminating defendant's suggested alternative causes of plaintiff's condition, making his differential diagnosis reliable and admissible. If, as defendant contends, Dr. Ginsberg's testimony at trial exceeds the scope of his expertise, the court will make such a determination at trial.[33]

As to Dr. Ginsberg's standard of care opinion, although a close call, the court sustains defendant's objection of unfair surprise. The purpose of requiring a party to disclose a report prepared by the expert witness containing "a complete statement of all opinions to be

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[32] *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001).

[33] *Abernathy v. United States*, No. 89-4171, 1992 WL 104939, at *1 (D. Kan. Apr. 1, 1992).

expressed and the basis and reasons therefor"[34] is to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony.[35] Plaintiff argues that whether the physician fell below the standard of care is a fundamental issue is any medical negligence case, and that therefore defense counsel should not have been unfairly surprised when Dr. Ginsberg's trial preservation deposition was taken. In addition, plaintiff argues that another of her experts, Dr. Weinberg, was offering a standard of care opinion in a deposition the day following Dr. Ginsberg's deposition, so this presumably was an issue that defense counsel was or should have been prepared to address. The court disagrees. Any different ruling in effect would promote "sand-bagging" by trial lawyers and ignoring the clear requirements of Rule 26(a)(2)(B). Defendant's motion, as to Dr. Ginsberg, therefore must be denied in part and granted in part.

B. Defendant's Experts

1. Peter A. Vogt, M.D.

Dr. Vogt is a plastic surgeon. He has been retained by defense counsel as a standard of care witness. Dr. Vogt opined that defendant not only met but exceeded the applicable standard of care during both of plaintiff's procedures on June 6, 2000. In Dr. Vogt's report, he found it "inconceivable" that the long thoracic nerve could have been cut during the loop suture method used by defendant in the procedures, and "totally inconceivable" that the long

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[34] Fed. R. Civ. P. 26(a)(2)(B).

[35] *See Schmitt v. Beverly Health & Rehabilitation Servs.,* No. Civ. A. 96-2537, 1997 WL 728133, at *3 (D. Kan. Nov. 19, 1997).

thoracic nerve could have been injured during the elevation of the serratus anterior muscle portion of the surgery.

Plaintiff argues that Dr. Vogt's opinions are uncertain and unreliable, and that they would be unhelpful to the jury as far as they constitute credibility determinations. Although the court finds that Dr. Vogt's credentials qualify him as an expert, the court also notes how rare it is to find medical testimony so assured, since medicine is not an exact science and such certainty can be easily attacked by cross-examination and the presentation of contrary evidence. In any event, plaintiff's arguments to exclude the testimony of Dr. Vogt do not concentrate on his reliability, but rather the credibility of his testimony, which clearly is for the jury to determine.

An assertion of a medical opinion is not a credibility determination about another who asserts a conflicting opinion. Thus, contrary to plaintiff's contention, the court finds that Dr. Vogt's inability to conceive of the possibility that defendant's actions might have caused plaintiff's condition is not an improper reference to the credibility of plaintiff's witnesses. Thus, the court finds that Dr. Vogt's testimony is admissible and that plaintiff's motion, as to Dr. Vogt, must be denied.

2. Richard B. Rosenbaum, M.D.

Dr. Rosenbaum is certified in internal medicine, neurology, and electrodiagnostic medicine. His testimony, which plaintiff argues is uncertain and lacks foundation, is related to causation of plaintiff's condition.

Plaintiff first contends that Dr. Rosenbaum's report shows that he did not review plaintiff's most recent medical evaluation by Dr. Eden Wheeler, making his opinions unreliable. Defendant responds by pointing out that Dr. Rosenbaum's opinion is entirely consistent with Dr. Wheeler's February 4, 2003 evaluation. As stated above, questions related to the source of an expert's opinion bear on the weight to be assigned to that opinion rather than its admissibility.

In his report, Dr. Rosenbaum lists five possible causes of the damage to plaintiff's long thoracic nerve. He gives no opinion about whether any of these causes is more likely or probable than the other. Plaintiff argues that this does not constitute a conclusion as to causation that will be helpful to the trier of fact. However, as defendant correctly points out, the burden is on plaintiff to establish with the requisite degree of certainty that her condition was a result of the June 6, 2000 surgery. A reasonable defense presentation would be one that calls the certainty of that conclusion into question, as Dr. Rosenbaum's opinion does. Thus, the court finds that Dr. Rosenbaum's opinion is admissible and that plaintiff's motion, as to Dr. Rosenbaum, must be denied.

IV. Conclusion and Order

Given the facts of this particular case, the nature of the experts retained by the parties, those experts' opinions, and the well-settled law that applies to *Daubert* motions, as a practical matter there are two mutually exclusive rulings the court could make. That is, all of the instant motions in limine could be denied and, as indicated above, the court believes that this is the correct course of action (except for standard of care testimony by

Dr. Ginsberg). Or all of the motions could be granted and neither of the parties would be allowed any medical expert testimony at trial. If either of the parties wishes to have the court reconsider its present rulings, then that party should be prepared to address this practical issue.

In any event, for the reasons stated above, defendant's motions in limine (**docs. 51, 52, & 53**), seeking to exclude the testimony of Andrew D. Brown, M.D., Hubert Weinberg, M.D., and Gerald D. Ginsberg, M.D., respectively, are denied, except **doc. 53** is granted to the extent that defendant seeks to preclude standard of care testimony by Dr. Ginsberg. Plaintiff's motion in limine (**doc. 54**), seeking to exclude testimony of defendant's experts, Peter A. Vogt, M.D. and Richard B. Rosenbaum, M.D., is denied.

IT IS SO ORDERED.

Copies of this order shall be served on all counsel of record.

Dated this 8th day of April, 2004, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge